Supreme Court, U. S.
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No.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1980

MICHAEL F. JARVILL, KENNETH LICHTY, and GREAT WESTERN SCHISM, INC.,

Petitioners,

v.

THE CITY OF EUGENE, et al,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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LARRY R. ROLOFF
834 Pearl Street, Suite 205
Eugene, Oregon 97401
(503) 686-8695
Counsel for Petitioners

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I. Questions Presented for Review.

A. May a city levy a special tax on a geographical sub area of the city without the consent of the persons taxed?

B. May a city levy a special tax and penalties on a particular class of persons where all others in the city are not similarly taxed and penalized and the direct benefits of the tax inure entirely to those persons not taxed?

The parties in this matter and the consolidated cases are:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Trial Court No. 74-2507

MICHAEL F. JARVILL,

Plaintiff-Appellant,

vs.

THE CITY OF EUGENE, et al.,

Defendants-Respondents.

Trial Court No. 74-2508

KENNETH LICHTY,

Plaintiff-Appellant,

vs.

THE CITY OF EUGENE, et al.,

Defendants-Respondents.

Trial Court No. 74-3369

CITY OF EUGENE, a Municipal corporation of the State of Oregon,

Plaintiff-Respondent,

vs.

GREAT WESTERN SCHISM, INC.,

Defendant-Appellant.

Opinions of the courts below are found at:

Michael F. Jarvill v. City of Eugene, 74-2507 (Cir.Ct.Or. [Lane County] filed April 26, 1977)

Jarvill v. City of Eugene, 40 Or App 185, 594 P2d 1261 (1979)

Jarvill v. City of Eugene, 289 Or 157, ___ P2d ___ (1980)

II. Grounds for Jurisdiction.

The Supreme Court of the State of Oregon entered an opinion in this matter on May 28, 1980. The Supreme Court denied Petitioner's Petition for Rehearing in this matter on July 2, 1980. Jurisdiction of this matter is conferred on the court by 28 U.S.C. §1257(3).

III. Constitutional Provisions, Statutes and Ordinances.

(See Appendix)

IV. Statement of the Case.

On May 31, 1972, the Common Council of the City of Eugene added section 2.380 to the Eugene Code which established a Downtown Development District and set forth its boundaries. On June 15, 1972, the Common Council of the City of Eugene added section 2.381 to 2.390 to the

Eugene Code which established a Downtown Development Board and defined its membership, terms of office, duties, proceedings and other functions.

On July 19, 1973, the Common Council of the City of Eugene submitted to the voters the following: A measure authorizing the levy of taxes for general operating purposes in excess of its tax base for the fiscal year beginning July 1, 1973; a charter amendment authorizing the Common Council to create a Downtown Development District with the powers to change its boundaries from time to time and to tax persons, property and economic enterprises in the district and to establish one or more agencies to assist the city in the exercise of those powers; and a measure authorizing the Common Council to levy a tax in the amount of

approximately $130,000 in excess of its tax base on real property in the Downtown Development District for the establishment of free parking of motor vehicles in that same area for the fiscal year beginning July 1, 1973, and ending June 30, 1974. All of the measures were approved.

On August 13, 1973, the Common Council of Eugene adopted Ordinance 16904 which added the following sections to the Eugene Code:

Section 3.700, entitled the Downtown Development District tax levy, imposed a tax on each professional who is not exempt under state law from municipal taxation a tax of $40 for each quarter that that person is engaged in a profession and a tax of $40 for each natural person whom he or she employed during part or all of that quarter as a

professional employe. This tax is imposed upon professional who are members of a partnership, association or corporation just as if they were individual proprietors. This section also imposes a tax on the gross sales or receipts of each nonprofessional person who engages in business in the Downtown Development District at the rate of $2.50 per $1,000 of gross retail sales and receipts. The rest of the subsections provide for the dates of payment and provide for a means by which a person can express his grievance if he feels that his classification is wrong.

Section 3.705 was added to the Eugene Code which defines gross sales and gross receipts. Section 3.710 provides for tax credits to certain owner-occupants of property in the Downtown

Development District. Section 3.715 provides for the administration of the taxes by the Director of the Department of Finance. Section 3.720 provides a means for forcing the collection of the taxes imposed by the proceding sections, and section 3.996 imposes penalties for failure to pay the tax as required and for divulging confidential information as defined in section 3.715.

On August 13, 1973, the Common Council of the City of Eugene levied a tax of approximately $130,000 on the real property in the Downtown Development District. On the same day the Common Council of the City of Eugene adopted the budget for the Downtown Development District by Ordinance 16906.

On the 8th day of October, 1973, the City of Eugene added section 5.232

and 5.233 which regulated the parking in the Downtown Development District, restricting that parking to certain individuals and permitting free parking to others.

On January 7, 1974, the City of Eugene enacted Code section 5.233 which required employers of persons in the Downtown Development area to furnish certain information to them. On the same date Code section 5.990 was enacted which provided for penalties for violation of the parking provisions and for failure to supply information as required by Code section 5.233.

The effect, and intent, of these ordinances and levies was to create a scheme of differential taxation unique in this nation: Unlike special assessment districts (for sewers and the like) where

the persons taxed receive the benefits of the tax, the Eugene Downtown Development District is an arbitrary classification where the persons taxed receive no direct benefits from the tax. Indeed, those within the District are subject to quasi-criminal penalties if they attempt to enjoy the benefits created by the taxes they pay.

The Jarvill and Lichty actions seek a declaratory judgment that the ordinances be declared void and unconstitutional. The complaints alleged that the ordinances were void as violative of Amendment XIV of the United States Constitution and various provisions of the Oregon Constitution. In a companion case, the City of Eugene seeks to recover unpaid Downtown Development District taxes from a retail store located within the

district owned by Great Western Schism, Inc. The trial court held that the ordinances were valid and constitutional and that the City of Eugene was entitled to collect the tax which it had asserted against Great Western Schism, Inc. The Court of Appeals affirmed in part and reversed in part. Dissenting opinions were filed by Butler, J. and Joseph, J. The majority opinion does not discuss the federal constitutional issues. The Equal Protection Clause was briefly discussed in each of the dissenting opinions.

The Supreme Court of Oregon affirmed the decision of the Court of Appeals as modified. Peterson, J. filed a dissenting opinion. The Court's opinion discusses both the issues of privileges and immunities and of equal protection. Both the Court of Appeals and the

Supreme Court of Oregon found that the ordinances were not repugnant to the Constitution of the United States.

Petitioners raised the question of validity of these ordinances under the Fourteenth Amendment of the Constitution of the United States at every stage of this case, including in Petitioner's Petition for Rehearing in the Supreme Court of the State of Oregon:

> "(5) The taxing provisions of the Downtown Development District deny the citizens affected thereby of their rights to equal protection guaranteed them by the Fourteenth Amendment of the United States Constitution and Article I, §20 of the Oregon Constitution.
>
> (6) The Downtown Development District business tax imposed upon professionals within the District is arbitrary and class legislation in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, &20 of the Constitution of the State of Oregon.

> (7) The parking regulations set forth in Section 5.232 of the Eugene Municipal Code deny those citizens affected thereby rights to equal protection guaranteed them by the Fourteenth Amendment of the United States Constitution and Article I, §20 of the Oregon Constitution." Appellant's Petition for Rehearing at 3 and 4

V. Reasons for Allowance of this Writ.

There are special and important reasons for granting Petitioner's Writ of Certiorari. A state court of appeals had decided an important question of federal law which has not been but which should be settled by this Court. The factual situation, as set forth in the Statement of the Case, supra, is unique in American history: A city, by majority vote, has taxed a discreet and insular minority distinguished on the basis of geographical location. The citizens of

the City of Eugene whose businesses and professional offices are within the Downtown Development District are subject to a special tax; citizens of the City of Eugene outside the District are not subject to the special tax. Those within the District receive no direct benefit from the tax; those outside the District receive all the benefits from the tax.

No decision of this Court nor any other reported decision (aside from the Opinions in this case) has dealt with such a situation. It is not surprising that this problem has not occurred before--the very unfairness of such a scheme of differential taxation renders it unlikely to be adopted by any government. For the reasons the scheme is unfair, it also violates the Equal Protection and Due Process Provisions of the Fourteenth

Amendment to the Constitution of the United States.

In West Virginia State Board of Education v. Barnette, 319 US 624, 638, 63 SCt 1178, 185-186, 87 L.Ed. 1628 (1943), this court stated:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The court reaffirmed this principle in Lucas v. Forty-Fourth General Assembly of Colorado, 377 US 713, 736-737, 84 SCt 1459, 1474, 12 L.Ed. 2d 632 (1964):

> "...A citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be."

In sum, a plebiscite by those receiving the benefits of a tax does not cure the constitutional defect in imposing the tax on an unwilling minority.

Substantively, the differential taxation scheme embodied in the ordinances of the City of Eugene violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Citizens of the City of Eugene within the special district are denied equal protection because geography is an impermissible basis for a classification. At a minimum, the Equal Protection Clause clearly includes the protections found in Article I, Section 32 of the Oregon Constitution with respect to uniform taxation.

> "(2) Location Not a Proper Basis. Before specific permissible bases for classifying property for purposes of taxation are listed, it is appropriate to eliminate one basis which is generally not regarded as

> permissible and which apparently is ruled out explicity and completely by the requirement of territorial uniformity in the Oregon constitution. This basis is location. 'Location of land,' says Cooley [citing 1 Cooley, Taxation 718 (4th ed 1924)], is 'not a proper basis for classification.'" O. Etter, Municipal Tax Differentials, 37 Or L Rev 1, at 41 (1957) (footnotes omitted)

The Due Process Clause is likewise violated because an election within the Downtown Development District has not been held; the City is depriving persons of property if they are located within the arbitrary boundaries of the District.

The fundamental and rankling objection to this system of differential taxation was well-summarized by Judge Joseph in Jarvill v. City of Eugene, 40 Or App 185, at 202 and 203, 594 P2d 1261 (1979) (dissenting opinion):

"Finally, I note that majority virtually ignores the violations of equal protection in a tax scheme that taxes specific persons and denies them all direct benefits of the program financed by the taxes. The taxes that stimulated the American revolution were less objectionable than that."

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Larry R. Roloff
Attorney at Law